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Supreme Court, U.S.
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(4)

No. 05-1239

In the Supreme Court of the United States

TVT RECORDS AND TVT MUSIC, INC.,

Petitioners,

v.

THE ISLAND DEF JAM MUSIC GROUP AND LYOR COHEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LYOR COHEN IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals lacks power to consider a purely legal ground for judgment that has been presented and rejected at the summary judgment stage, in the party's pretrial memorandum, and in requested jury instructions, and has actually been decided by the district court in passing upon these matters and upon the defendants' Rule 50(a) motion, because the ground was not explicitly stated in the Rule 50(a) motion.

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RESPONDENT LYOR COHEN'S BRIEF IN OPPOSITION

Petitioners have striven mightily to find a question to present that has a patina of certworthiness. But, like Cinderella's stepsisters' attempts to squeeze into the glass slipper, the question they present does not fit their case. The Second Circuit did not grant judgment to respondents on the ground that, as a general matter, purely legal propositions do not need to be included in the Rule 50(a) motion to be available on appeal, but relied instead on the repeated presentation of the argument at various stages of the district court proceedings and, most significantly, the fact that the district court explicitly passed on the argument in its order denying respondent's Rule 50(a) motion. None of petitioners' allegedly conflicting cases present such circumstances.

As for the Second Circuit's reversal on the copyright infringement claim, the court did not even discuss, let alone adopt any rule with precedential force, regarding its power to act on the ground it did; consequently, its action on the point presents nothing to review other than a bare claim of error. Moreover, respondents did specifically contend in the trial court that the licenses were valid; while the Second Circuit employed a different rationale in accepting that claim, such action was well within its discretionary power.

Finally, this Court's recent decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 126 S.Ct. 980 (2006), has no bearing on this case. *Unitherm* involved a total failure by the appealing party to lodge any *post-verdict* motion under Rule 50(b); it was not about Rule 50(a). Here, it is undisputed that respondents filed comprehensive motions under Rule 50(b).

STATEMENT

This short statement supplements and corrects the statement of the case set forth in the petition.

This case arises from a dispute between two competitors in the music industry regarding the services of hip-hop artist Ja Rule. Petitioner endeavored to turn what was essentially a contract case into a lucrative tort lawsuit. This strategy was successful in the district court, where the jury awarded petitioner $131 million in tort damages, in contrast to its award of just $127,000 in breach-of-contract damages – an award that respondents did not even bother to appeal. (Pet. App. 1a, 7a n.2). At the end of the day, however, the court of appeals found that petitioner's tort theories were legally unsustainable, leaving them only with their modest contract damages.

A. The Parties' Dispute

The case grew out of an alleged agreement (the Side Letter Agreement, or "SLA") under which respondents, Island Def Jam Music Group ("IDJ") and Lyor Cohen (then an executive at IDJ), supposedly agreed to let Ja Rule, a hip-hop artist then under exclusive contract with IDJ, participate in an album that would be produced by petitioners TVT Records and TVT Music, Inc. (collectively, "TVT" or "petitioner"). TVT had earlier entered into an agreement (the Heads of Agreement, or "HOA") with Ja Rule and Irv Gotti, a record producer also under exclusive contract with IDJ, to produce this album.

Eventually, IDJ, through Cohen, refused to permit Ja Rule and Gotti to proceed with the TVT album. While this was clearly a breach of contract if, as the jury ultimately found, the SLA was a valid and binding agreement, TVT was not satisfied with its contract remedies under New York law. It therefore took the position that the contract breach also constituted two separate torts: fraud, on the ground that respondents had entered into the SLA without intending to per-

form it; and tortious interference with contract, on the ground that the refusal to perform the SLA interfered with TVT's rights under the HOA.

B. Proceedings in the District Court

In August 2002, petitioner filed this action alleging breach of contract, tortious interference, fraud, and copyright infringement. In their answer to the amended complaint, respondents raised the defense that they could not be held liable for tortious interference with the HOA because IDJ was effectively a party to that agreement due to the interrelationship between the SLA and the HOA, which could not be implemented without IDJ's consent. (Pet. App. 8a n.4) (A 435, ¶87). (This will be referred to as "the single-contract theory").

When respondents moved for summary judgment, the single-contract theory was one of the asserted grounds. (Pet. Pet. App. 8a n.4; 37a-38a) (A 197). The district court rejected this argument (Pet. App. 38a) and denied the motion for summary judgment (Pet. App. 45a).

Respondents reiterated the single-contract theory in the joint pre-trial order (Pet. App. 8a n.4) (A 457), in their pre-trial briefs (Pet. App. 8a n.4) (A 282) and by requesting a jury instruction embodying the point (Pet. App. 8a n.4).

Trial began on March 10, 2003 and was bifurcated into liability and damages phases. At the close of the evidence on liability, respondents made an oral motion for judgment as a matter of law ("JMOL") pursuant to Rule 50(a). (Pet. App. 46a). In the midst of making the motion, counsel was cut off by the court, which did not wish to hear a reiteration of arguments that it had already considered and ruled upon. (A1190:20-1191:5; A1205:21-1206:3).

On March 21, 2003, the jury returned its verdict (Pet. App. 46a), finding IDJ liable for breach of contract and IDJ and Cohen jointly and severally liable for tortious interfer-

ence, fraudulent concealment, and copyright infringement. (Pet. App. 6a). In its Order of April 8, 2003, the district court denied respondents' Rule 50(a) motion. In doing so, it specifically addressed and rejected the defense that "the Side Letter Agreement and the Heads of Agreement were *** intended by the parties to constitute a single integrated contract *** and, consequently, [that] they cannot be liable for tortiously interfering with a contract to which they are parties." (Pet. App. 51a-52a).

Following the damages phase of the trial, the jury awarded TVT $25 million in compensatory damages, $52 million in punitive damages against IDJ, and $54 million in punitive damages against Cohen. (Pet. App. 1a, 6a; Pet. 8 & n.6). Respondents then moved for JMOL under Fed.R.Civ.P. 50(b) and also moved, in the alternative, for a new trial and/or remittitur pursuant to Fed.R.Civ.P. 59. (Pet. App. 6a, 86a). Respondents again argued that they could not be held liable for tortious interference with the HOA because, *inter alia*, they were "parties to the contract that was interfered with" insofar as "IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement." (Pet. App. 93a). In denying the Rule 50(b) motion, the district court stated that the "same arguments [had been] presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) following [the] liability phase" of the trial. (Pet. App. 93a-94a).[1]

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[1] Respondents also argued that IDJ was party to the HOA, and therefore not a stranger to the contract that could be sued for tortious interference, by virtue of its 50% stake in the Murder, Inc. joint venture that was TVT's counterparty in the HOA. (Pet. App. 95a-96a). Significantly, and in marked contrast to the single-contract theory, the district court found this claim waived on the ground that respondents had not raised this particular theory of

On September 2, 2003, the district court denied respondents' post-trial motions, except that it remitted the punitive award against Cohen to $3 million and against IDJ to $25 million for tortious interference, $1 million for fraud, and $125,000 for breach of contract. (Pet. App. 6a) (SPA 13, 60). Petitioner accepted the remittiturs. (Pet. 8 n.6).

C. Proceedings in the Second Circuit

Respondents' appeal challenged the liability verdicts on tortious interference, fraudulent concealment, and copyright infringement, as well as the compensatory and punitive damages awards on those claims. IDJ did not appeal from the breach-of-contract compensatory award of $127,000, though it did appeal the punitive award for breach of contract. (Pet. App. 7a n.2). The Second Circuit held that "TVT's claims for tortious interference and for fraudulent concealment fail for lack of a legally sufficient evidentiary basis," and that, as a matter of law, "TVT is not entitled to assert a claim for copyright infringement without having rescinded the licenses on which its infringement claim is based." (Pet. App. 7a). Applying settled principles of New York law, the Second Circuit ruled that TVT's tortious-interference claim was untenable because IDJ was a party to the SLA (as the jury found) and the "SLA and the HOA were a single contract." (Pet. App. 8a). Therefore, IDJ was also a party to the HOA and, as "a party to the HOA *** IDJ could not have tortiously interfered with Gotti's and Ja Rule's performance under the HOA." (Pet. App. 8a-9a).

The Second Circuit rejected TVT's "perfunctory" contention that respondents failed to preserve the single-contract argument for appeal. (Pet. App. 8a n.4). The court deemed TVT's forfeiture argument inadequate because TVT had relegated that issue – now the entire predicate for TVT's certio-

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participation in the HOA in their Rule 50(a) motions. (Pet. App. 95a-96a).

rari petition – to a single, brief footnote. In its entirety, TVT's waiver argument read: "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A1194:14-1196:6). Thus, Defendants waived their 'same contract' argument, too." See Brief of Appellees TVT Records and TVT Music, Inc., dated April 16, 2004, at 36 n.14.

The Second Circuit found the issue adequately preserved because it was clear from the record that "the court and the plaintiffs received multiple notices of, and a full opportunity to contest, the argument" by virtue of respondents' reiteration of the single-contract contention in their answer to the amended complaint, in their summary judgment motion, in the joint pre-trial order, and at the charge conference. (Pet. App. 8a n.4). The Second Circuit further observed that, despite TVT's assertions that respondents forfeited the "single-contract" argument by not including it in their Rule 50(a) motion, the district court – intimately familiar with the argument from respondents' repeated presentations of it – nonetheless "saw fit to dispose of the argument in its denial of the [respondents'] Rule 50(a) motion." (Pet. App. 8a n.4). As elaborated above, the district court had explicitly addressed and rejected the "single-contract" argument in its order denying the Rule 50(a) motion. See Pet. App. 51a-52a. In conclusion, the court of appeals opined that respondents were not required to "make pests of themselves" by repeating arguments already made numerous times before.[2]

With respect to respondents' claim that the copyright licenses were not invalid, the court of appeals held that "the District Court mistakenly concluded that '[a] fraudulently

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[2] The district court actually imposed sanctions on respondents for what it viewed as their unnecessary and unwarranted repetition of arguments. See SPA-192; *TVT Records* v. *Island Def Jam Music Group*, 288 F. Supp. 2d 506, 509-510 (S.D.N.Y. 2003) (citing 279 F. Supp. 2d 413, 454 (S.D.N.Y. 2003)).

induced copyright license is invalid' *ipso facto*," when in fact "the license must formally be rescinded before an infringement action based on fraudulent inducement of a copyright license can proceed." (Pet. App. 16a). No such rescission occurred here, a fact that TVT has never contested. This particular ground for rejecting TVT's copyright claim had not been raised by respondents.

DISCUSSION

Petitioner has a serious problem: it has been unable to find a single case in which a court of appeals refused to consider a ground for JMOL that was repeatedly raised by the defendant and repeatedly rejected by the trial court, including an explicit rejection by the trial court in ruling on the defendant's Rule 50(a) motion.

As a result, the conflict that petitioner puts forward as warranting this Court's resolution, dubious on its own terms (see pages 10-11 *infra*), has little or nothing to do with this case, which is therefore a wholly inappropriate vehicle for resolving the issue.

1. Plucking out language from various cases, petitioner contends that a number of circuits refuse to entertain claims for JMOL that have not been raised in a Rule 50(a) motion. A closer examination of these cases causes the claimed conflict, like the Cheshire Cat, to disappear, in this instance even to the grin:

- In *Larch* v. *Mansfield*, 272 F.3d 63, 75-76 (1st Cir. 2001), the defendant failed to respond to plaintiff's request for prejudgment interest. The district court, "having received no opposition" from the defendant (*id.* at 75), granted the request. Not surprisingly, the court of appeals refused to entertain the defendant's belated objection.

- In *Tapalian* v. *Tusino*, 377 F.3d 1, 7 n.1 (1st Cir. 2004), there is no indication in the opinion that the waived issue, the *res judicata* effect of a prior settlement, had been raised at any time prior to appeal.

- The same appears to be true of the statute of limitations claim in *Johnson* v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997). The court of appeals stated that "[w]e decline to exercise our discretion to address this issue on appeal" (*id.* at 1331), thus demonstrating that it follows no rigid rule barring review in such circumstances.

- In *Varghese* v. *Honeywell Int'l*, 424 F.3d 411, 420-22 (4th Cir. 2005), the defendant raised a preemption argument at the summary judgment stage but appears not to have renewed it thereafter until the appeal. The court refused to entertain the claim, holding that it would not review summary judgment rulings on appeal. The ruling was not predicated upon some supposed ironclad requirement that the issue be specified in the 50(a) motion. *Chesapeake Paper Prods. Co.* v. *Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995), appears to be another instance of a refusal to review the ruling on a summary judgment motion.

- *Black* v. *J.I. Case Co. Inc.*, 22 F.3d 568, 570-71 (5th Cir. 1994), is another exemplar of the proposition that appellate courts will not review summary judgment rulings. The court did review the Rule 50 motions, however, and there is no indication that any issue was deemed waived.

- In *Hopp* v. *City of Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999), the opinion does not suggest that

the defendant's claim that it was not subject to a private right of action was ever raised before the Rule 50(b) motion.

- *Bradford-White Corp.* v. *Ernst & Whinney*, 872 F.2d 1153, 1160-61 (3d Cir. 1989), is a case in which the defendant chose for tactical reasons not to present its statute of limitations defense at either the summary judgment or the Rule 50(a) stage. The court of appeals simply affirmed the district court's unsurprising ruling on the Rule 50(b) motion that the issue had been waived.

- Finally, in *Bonjorno* v. *Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), the court of appeals reversed a grant of JMOL on the Rule 50(b) motion based on a claim that had not been raised in the Rule 50(a) motion. The rationale for this decision – that notice of the claim is needed before the conclusion of trial, and that the plaintiff could have reopened its case had it been aware of the defendant's position – obviously has no application here, where the contention had been repeatedly raised by respondents and repeatedly rejected (five times, at least) by the trial court.

Many of these cases involved arguments that appear not to have been raised at all prior to appeal, or at least prior to verdict. Unlike this case, not one of them involved a finding of forfeiture of an argument that had been repeatedly raised and passed upon in the course of the trial court proceedings, let alone one that the district court itself treated as raised and went on actually to address in ruling on the 50(a) motion. Pet. App. 51a-52a; see also Pet. App. 8a n.4.[3]

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[3] Noteworthy in this connection is the district court's subsequent order denying respondents' Rule 50(b) motion. There, the court

Petitioner's insistence that the "single-contract" defense to the tortious interference claim was forfeited also cannot be reconciled with the district court's thorough review of that argument in its Rule 50(a) order. Pet. App. 51a-52a. This fact renders the current case a unique outlier from the typical waiver case. Even if the respondents' failure to repeat the "one-contract" argument yet again in their Rule 50(a) motion would otherwise have worked a forfeiture of the contention, it would make no difference in these unique circumstances because the district court nevertheless expressly considered and ruled upon the argument, thereby mooting the forfeiture objection. See *Meacham* v. *Knolls Atomic Power Lab.*, 381 F.3d 56, 70 (2d Cir. 2004), *vacated on other grounds*, 544 U.S. 957 (2005) ("[Defendant] KAPL's failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver ***. Nevertheless, the waiver is not an absolute one. Here, the district court considered whether a disparate impact claim was tenable under the ADEA notwithstanding KAPL's failure to raise the issue. The district court's decision allows us to proceed with review. See *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (considering the merits of an issue where – despite party's failure to present it to the courts below – those courts decided it).").

2. TVT's claim that the conflict it identifies – disconnected though it may be from the instant case – is worthy of review is itself suspect. The insubstantial nature of the conflict is fully elaborated in IDJ's brief in opposition. We add here only that any subtle differences among the circuits in their approach to waiver questions, unlike rules regulating

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confirmed that the defense "that IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement" was "presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)." (Pet. App. 93a-94a).

parties' primary conduct, is readily tolerable in our national judicial system.

3. Even if the question posed by the petition were actually presented by the decision below and otherwise worthy of this Court's attention, this case would remain a poor vehicle for addressing that question.

First, respondents cannot fairly be faulted for any deficiencies in their Rule 50(a) motion with respect to the single-contract theory because their oral application under Rule 50(a) was cut short by the district court, which expressed impatience with respondents' presentation of arguments that the court deemed repetitious of arguments previously presented and rejected. See A1190:20-1191:5; 1205:21-1206:3. When the respondents took pains to preserve arguments in their Rule 50(b) motion, they were again rebuked by the district court for wasting its time: "[T]he Court does not countenance such piecemeal briefing that is inherently inefficient and disruptive *** " (SPA-192). Indeed, the District Court even ordered respondents to pay TVT's attorneys' fees, based on respondents' persistence in raising arguments that the court had repeatedly rejected. See *TVT Records* v. *Island Def Jam Music Group*, 288 F. Supp. 2d 506, 509-510 (S.D.N.Y. 2003) (citing 279 F. Supp. 2d 413, 454 (S.D.N.Y. 2003)).

Under these circumstances, it would be fundamentally unfair to find forfeiture of an argument of which TVT had prior and repeated actual notice. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Weible*, 92 F.3d 108, 113 (2d Cir. 1996) ("the district court cut short Plaintiffs' argument"); *Wilson Sporting Goods Co.* v. *David Geoffrey & Assocs.*, 904 F.2d 677, 683 (Fed. Cir. 1990) (rejecting appellee's argument that appellant had failed to meet Rule 50's specificity requirement because "the court cut short counsel's statement"); *Lamborn* v. *Dittmer*, 688 F. Supp. 113, 115 (S.D.N.Y. 1988) (because court indicated that making the motion would be "a waste of time" and that little time would be allowed for argument, "the court has

to bear much of the responsibility for counsel's silence. It would not be fair now to deny the motion on procedural grounds"), *rev'd on other grounds*, 873 F.2d 522 (2d Cir. 1989).

Second, as the court of appeals itself noted, TVT's contention that respondents failed to preserve their arguments under Rule 50 was, to put it mildly, "perfunctory." (Pet. App. 8a n.4). In fact, it was so perfunctory that TVT devoted only a single, short footnote to the question that is now the core of its certiorari petition. See page 6, *supra*. In contrast to respondents' supposed waiver, which, if anything, was a mere failure to reiterate the objection at the proper time, petitioners failed to develop their argument at all. Such a lackadaisical presentation by TVT was insufficient to present the issue on appeal. "A contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote." *Tolbert* v. *Queens College*, 242 F.3d 58, 75 (2d Cir. 2001). See *also LaFevers* v. *Gibson*, 182 F.3d 705, 725 (10th Cir. 1999) ("We have repeatedly warned litigants that issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal."); *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Therefore, TVT's Rule 50 argument was not properly presented even in the court below. This is not an auspicious circumstance for plenary consideration by this Court.

Third, and finally, even if there were a circuit conflict justifying guidance from this Court as to the application of Rule 50(a), granting review of a case from the Second Circuit's side of the supposed split would pose acute problems of unfairness arising from retroactive application of a new rule of law. Respondents here were entitled to rely on Second Circuit precedent governing what is necessary to preserve an argument for appeal. Announcing a new rule in this case would penalize them unfairly. Consequently, if the

Court wishes to address the supposed circuit conflict, a case drawn from the other side of the split (the side requiring more explicit, specific, and rigorous preservation of arguments) would be a more appropriate vehicle.

4. TVT objects that the Second Circuit's ruling rejecting TVT's copyright infringement claim on the basis of its failure to rescind the copyright licenses it had given to IDJ also somehow transgresses Rule 50. Pet. 10, 18-19. Again, this issue is thoroughly addressed in IDJ's response. We add only two observations. First, as petitioner expressly concedes, respondents in fact "argued that they had valid licenses." (Pet. 7). Thus respondents raised and preserved the *issue*. While they did not press precisely the same *argument* on that issue as that on which the court of appeals relied, it does not violate any waiver principles to accept on appeal arguments or theories on an issue that differ from those made at the trial court. See *Ford* v. *Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996) (issue is properly preserved where, at worst, party "proffer[s] a new legal argument that concerns an issue already considered at some length by the district court"); *cf. Pamida, Inc.* v. *E.S. Originals, Inc.*, 281 F.3d 726, 731 n.4 (8th Cir. 2002) (appeals court may affirm ruling regardless of whether lower court's reasoning was correct).

Second, the court of appeals' opinion contains no discussion of the waiver question petitioner seeks to raise and sets no precedent on the subject. Even assuming petitioner's objection to the copyright ruling were well founded, therefore, it amounts to nothing more than a request for correction of a non-precedential error. It is therefore a highly unsuitable candidate for this Court's review.

5. Finally, TVT contends that review – indeed, summary vacatur – of the judgment below is appropriate on the basis of this Court's recent decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006). See Pet. 11, 14, 27-28. This contention is baffling, as *Unitherm* did

not involve the application of Rule 50(a). Rather, it involved "the implications of a party's *failure to file a postverdict motion under Rule 50(b)*" or Rule 59. *Unitherm*, 126 S. Ct. at 985 (emphasis added). In the instant case, there was a thorough Rule 50(b) motion filed. Therefore, *Unitherm* is wholly inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

Respondents mischaracterize the record and the law, but cannot dispute that the Second Circuit granted JMOL on two grounds never articulated in any Rule 50(a) motion. The Second Circuit's express justification for excusing this waiver was its view that both issues were questions "of law." Pet. App. 9a, 15a n.8. The First, Third, Fourth and Fifth Circuits would not have set aside the jury's verdicts because those circuits, unlike the Second, do not grant JMOL on issues "of law" not raised in pre-verdict motions. Respondents cite many cases from the circuits in which TVT would have prevailed, but none actually excuses noncompliance with Rule 50(a) as Respondents contend. In fact, none of Respondents' cases even implicates the significant circuit split presented here: Many do not involve jury trials or Rule 50; in others, the court found that there was a Rule 50(a) motion or its "functional equivalent" presenting the issue, unlike here; and the rest were decided under a plain error standard, which was not applied and could not have been satisfied here. The Petition thus squarely presents a significant circuit split warranting *certiorari*.

At a minimum, the Court should grant, vacate and remand in light of *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006). Respondents would limit *Unitherm's* reach to cases in which no Rule 50(b) motion was made. Their narrow reading, however, completely ignores this Court's explicit holding that JMOL may only be granted "on grounds advanced in the pre-verdict motion." *Id.* at 984 n.1. That holding requires reversal of the decision below.

I. THE ISSUE RAISED IN THE PETITION IS SQUARELY PRESENTED

Respondents do not contest that the Second Circuit *expressly* held that they did not file a Rule 50(a) motion raising the "single contract" issue, but excused this waiver, stating: "We are not troubled by the fact that the defendants did not reiterate [the "single contract"] claim in

their Rule 50(a) motion...." Pet. App. 8a n.4. Nor do they dispute that the Second Circuit acknowledged reversing the copyright verdict on a basis that Respondents did not urge on appeal, much less at the 50(a) stage. *See id.* at 16a (reversing copyright verdict "but not for the reason advanced by [Respondents]"); Cohen Opp. at 7 (conceding that Respondents did not raise "[t]his particular ground").

Instead, Respondents erroneously claim that this case does not raise the question presented because the Second Circuit "never invoked the supposed 'issue of law' exception to Rule 50 to which TVT objects...." IDJ Opp. at 20. The sole justification for the Second Circuit's decision to set aside two jury verdicts and grant JMOL on bases never raised in a Rule 50(a) motion was that it deemed both issues questions "of law." Pet. App. 9a ("[I]f the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court."); *id.* at 8a n.4 (emphasizing Respondents' arguments on "single contract" in summary judgment reply to excuse failure to comply with Rule 50(a)); *id.* at 15a n.8 ("We note that when the trial court denies a Rule 50 motion, both that denial and 'errors of law in the trial court may be raised on appeal.'" (citation omitted)).

In addition, Respondents contend that the District Court denied them an opportunity at Rule 50(a) to raise the issues the Second Circuit decided; and that TVT was not prejudiced by their failure to comply with the Rule. IDJ Opp. at 27; Cohen Opp. at 11. Even if true, these arguments would not be relevant because this case squarely presents an acknowledged failure to comply with Rule 50(a); in any event, the record flatly contradicts Respondents' claims.

First, Cohen's assertion that the District Court "cut short" counsel's oral Rule 50(a) motion and prevented Respondents from complying with the Rule, Cohen Opp. at 11, is simply not true. The transcript shows that counsel consumed eleven transcript pages with unfettered argument, yet never mentioned the "single contract" or rescission issues. Petitioners' Reply Appendix ("Reply

App.") 12a-19a. As the District Court itself has explained, the only point at which it understandably limited Respondents' argument was after TVT had responded: "[T]he Court never 'truncated' Defendants' counsel's presentation in support of their motion under Rule 50(a). Rather, the Court ended counsel's *reply* presentation" to avoid repetition. Pet. App. 96a n.7; *see* Reply App. 24a.

Second, IDJ's claim that the District Court "premised its attorneys' fees award on Respondents' insistence on raising the ["single contract"] argument throughout the litigation even after the District Court had repeatedly rejected it," and that this somehow excused Respondents' failure to present this argument in its Rule 50(a) motion, IDJ Opp. at 4, 14, is equally meritless. The District Court did observe in its fees opinion that Respondents engaged in unnecessarily aggressive litigation tactics, such as IDJ's "purported [ ] cancel[ation] of their earlier repudiation of their contract with TVT, the very agreement that, coming into the trial, they had vehemently denied ever existed, thereby causing a bifurcation of the trial and prolonging final resolution of the merits of the case." Special Apx. 53. However, the District Court actually denied the vast majority of the fees requested by TVT. Reply App. 8a-9a. The only fees the trial court granted were those incurred by TVT after the jury verdict was returned – a "penalty" that could not have dissuaded IDJ from filing a *pre-verdict* motion. *Id.*[1]

Third, there is no merit to Respondents' contention that their failure to raise the "single contract" defense in their pre-verdict motion was somehow cured by the District Court's decision to address the issue in its Rule 50(a) ruling. IDJ Opp. at 27; Cohen Opp. at 11. The District Court's Rule 50(a) decision was not issued until three weeks *after* the jury

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[1] IDJ's contention that the District Court prevented it from filing its Rule 50(b) motion, IDJ Opp. at 9, has no bearing on its failure to raise the relevant arguments pre-verdict. Moreover, the District Court refused the motion because "no judgment has been entered, and the jury has yet to make its determination on damages." *Id.* After judgment was entered, Respondents were permitted to file Rule 50(b) motions.

returned its verdict on liability. Special Apx. 114 (jury charged on March 19 and returned verdict on March 21); *id.* at 183 (District Court issued Rule 50(a) decision on April 9). Thus, it could not have cured the Seventh Amendment problem that Respondents created when they elected not to raise this defense at the Rule 50(a) stage. And Respondents ignore that TVT never had any notice of the rescission theory that the Second Circuit raised *sua sponte*.

Finally, TVT did not waive the argument that Respondents did not file a Rule 50(a) motion preserving the relevant defenses, and the Second Circuit did not hold that it did. Instead, the Second Circuit addressed TVT's waiver argument on the merits. Pet. App. 8a n.4. This is not surprising because four pages of TVT's appellate brief were devoted to various waiver arguments. These included discussion of IDJ's attempt to insert its newly minted "same entity" argument, and that "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A-1194:14-119:6.) Thus, Defendants waived their 'same contract' argument, too." Brief of Appellees at 34-37 & n.14. TVT surely was not required to reiterate the legal support and reasoning it had already presented in the context of the "same entity" argument.[2]

II. THE SECOND CIRCUIT'S RULING CONFLICTS WITH THE LAW OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS

As discussed above, the Second Circuit's decision is a purported application of its rule permitting "correct[ion of] an error below despite the lack of a timely request in the district court [pursuant to Rule 50] if the issue is purely legal and no fact finding is required." *Meacham v. Knolls*

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[2] Moreover, this Court has not hesitated, in the face of similar arguments, to summarily vacate and remand for reconsideration in light of *Unitherm*. *See Vazquez-Valentin v. Santiago-Diaz*, 126 S. Ct. 1329 (2006) (vacating *Vazquez-Valentin*, 385 F.3d 23, 29 n.8 (1st Cir. 2004), in which court found that appellee waived her Rule 50 waiver argument).

Atomic Power Lab., 381 F.3d 56, 69 (2d Cir. 2004), *vacated on other grounds*, 544 U.S. 957 (2005); *see* Petition at 16 (discussing earlier Second Circuit cases applying this alleged exception to Rule 50).

The Second Circuit's exception to Rule 50 authorizing review of waived issues "of law," which has also been adopted by the Sixth, Ninth, Tenth and Federal Circuits, Petition at 25-27, directly conflicts with the law of the First, Third, Fourth and Fifth Circuits. *See* Petition at 21-25.[3] Respondents' argument that these cases do not mean what they say, and that these circuits actually do review issues not preserved in Rule 50(a) motions on a discretionary basis, IDJ Opp. at 21-26, is wrong. Many of the cases they cite do not even involve jury trials, much less Rule 50, and the Seventh Amendment concerns they implicate.[4]

The cases Respondents cite that actually involve Rule 50, moreover, are all fully consistent with TVT's position that it would have prevailed in the First, Third, Fourth and Fifth Circuits, which would not have addressed the issues the Second Circuit relied on to set aside the jury's verdict. For example, Respondents cite a number of cases where the court reviewed an issue because it concluded that the appellant *had* properly preserved it through a Rule 50(a)

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[3] IDJ's contention that *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004) (cited in the Petition at 22), is not in conflict with the Second Circuit's decision is baseless. The First Circuit expressly held: "As Tusino failed to raise this argument in his Rule 50(a) motion at the close of the evidence, it is deemed waived on appeal." *Id.* at 7 n.1. Although the court went on briefly to discuss the merits of the underlying claim, it prefaced its remarks with "even if the issue had not been waived ..." and rejected the waived argument. *Id.*

[4] *See Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 542-43 (4th Cir. 2005) (appeal from denial of motion to compel arbitration); *Maine General Med. Ctr. v. Shalala*, 205 F.3d 493, 500 (1st Cir. 2000) (appeal from summary judgment ruling); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 n.25 (3d Cir. 1996) (appeal from grant of summary judgment); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259, 1263 n.1 (4th Cir. 1989) (appeal from order removing case to federal court); *Weaver v. Bowers*, 657 F.2d 1356, 1362 (3d Cir. 1981) (reaching issue after bench trial in highly "unusual circumstances").

motion or its "functional equivalent." *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995) (deciding issue preserved by oral Rule 50(a) motion made in chambers); *see Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 457 (5th Cir. 2001) (finding that appellant "adequately preserved the [relevant] issue"); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000) (rejecting waiver claims because grounds asserted in pre-verdict motion were "sufficiently similar" to post-trial motion); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998) (finding defendant's Rule 50(a) motion sufficient to preserve contested issue because "party now claiming waiver understood ... tenor of the Rule 50 movant's position and theory"); *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 485, 488 (3d Cir. 1991) (reviewing issue raised in motion *in limine* never decided by the district court and remanding for new trial but refusing to grant JMOL); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984) ("jury instructions may suffice to fulfill the requirement that a motion for a directed verdict be made before granting a JNOV *only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such*") (emphasis added); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 832 (3d Cir. 1983) (finding motion "sufficiently specific to satisfy Rule 50"); *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979) (holding issue preserved in "[o]ral motions for 'dismissal'").[5]

Here, the Second Circuit concluded that Respondents never argued the "single contract" or rescission theories on

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[5] Respondents cite one 19-year old case in which the Fourth Circuit decided an unpreserved legal issue where it found that appellant's waiver "did not prejudice" the other side. *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987). That case, however, is not good law in the Fourth Circuit after its more recent decisions, including *Chesapeake Paper Products Co. v. Stone & Webstern Engineering Corp.*, 51 F.3d 1229 (4th Cir. 1995), and *Varghese v. Honeywell International Inc.*, 424 F.2d 411, 422-23 (4th Cir. 2005), which expressly acknowledged the circuit split on the question presented in the Petition.

Rule 50(a). The court below granted JMOL on these issues because it viewed them as legal questions. The circuits on the other side of the split would not have done so. *See, e.g., Varghese*, 424 F.3d at 422 (reaffirming prior case law expressly "reject[ing] the 'contention that our review should depend on whether the party claims an error of law or an error of fact'"). Indeed, many of Respondents' own cases refuse to grant plenary review because the appellant did not comply with Rule 50. *See, e.g., Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 993 (3d Cir. 1996) ("'It is clear under our jurisprudence that this court cannot reverse the district court's decision denying [a] Rule 50(b) motion for j.n.o.v. on the basis of an argument the [a party] failed to raise in support of its predicate Rule 50(a) motion for a directed verdict.'") (citations omitted); *Bonjorno*, 752 F.2d at 815 (same).

Respondents also rely on a few cases in which the First, Fourth and Fifth Circuits reviewed arguments that were not preserved in Rule 50(a) motions under the plain error standard. For example, in *Singer v. Dungan*, 45 F.3d 823, 828 (4th Cir. 1995), the defendant neglected to file a Rule 50(a) motion, but the Court of Appeals held that "even in the wake of a complete failure to move for judgment as a matter of law, if plain error would result, appellate review is permissible." *See also Davignon v. Clemmey*, 322 F.3d 1, 13 (1st Cir. 2003) (reviewing "whether the record reflect[ed] an absolute dearth of evidentiary support for the jury's verdict" where appellant failed to comply with Rule 50) (quotation marks omitted); *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 573 (5th Cir. 2002) (same).

This plain error exception to the requirements of strict compliance with Rule 50 – which probably does not survive *Unitherm*[6] – does not apply here. The Second Circuit did

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[6] *Unitherm* held the lower courts "powerless" to provide relief not requested pre-verdict and renewed in a post-verdict motion. 126 S. Ct. at 985-86, 88. This Court has thus granted, vacated and remanded in light of *Unitherm* a decision reviewing an argument waived on Rule 50 for plain error. *See* 126 S. Ct. 1329 (remanding *Vazquez-Valentin*, 385 F.3d at 29